

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

XPERTUNIVERSE, INC.,) Trial Volume 8
)
 Plaintiff,)
) C.A. No. 09-157 (RGA)
v.)
)
)
CISCO SYSTEMS, INC.,)
)
 Defendant.)

Thursday, March 21, 2013
12:03 p.m.
844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE RICHARD G. ANDREWS
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

STROOCK & STROOCK & LAVAN
BY: CHARLES E. CANTINE, ESQ.
BY: JASON SOBEL, ESQ.
BY: CLAYTON McCRAW, ESQ.

Counsel for the Plaintiffs

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3 MORRIS NICHOLS ARSHT & TUNNELL, LLP
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5 -and-

6 MORGAN LEWIS & BOCKIUS, LLP
7 BY: BRETT M. SCHUMAN, ESQ.
8 BY: KELL M. DAMSGAARD, ESQ.

9 Counsel for the Plaintiffs
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1
2 P R O C E E D I N G S

3
4 (Proceedings commenced in the
5 courtroom at 12:03 p.m.)
6

7 THE COURT: Mr. Rovner, you're
8 here. I'm not sure why the rest of your team
9 isn't here when I note, I remember yesterday you
10 saying, we're only ten minutes away. It has now
11 been 20 minutes.

12 MR. ROVNER: They had to come
13 all the way from the Doubletree. I can't
14 explain.

15 THE COURT: Well, then, they're
16 going to have to hang around closer by in the
17 future. So sit down.

18 Did you get, Mr. Rovner, the note?

19 MR. ROVNER: Yes.

20 THE COURT: All right. Do you
21 know what your side's position is?

22 MR. ROVNER: Well, I believe that
23 the damages reports cannot go to the jury.

24 THE COURT: I think that's pretty

1 clear.

2 MR. ROVNER: So I have no problem
3 giving them the testimony.

4 THE COURT: All right. Mr.
5 Schuman?

6 MR. SCHUMAN: Your Honor, our
7 position is they should not get the whole
8 testimony, specifically with respect to
9 Mr. Bratic.

10 Well, first of all, the testimony
11 has a bunch of sidebars and other stuff in
12 there.

13 THE COURT: That's an issue, but
14 that could be dealt with.

15 MR. SCHUMAN: And also with
16 respect to Mr. Bratic, you might recall, we had
17 a number of objections, some of which were
18 sustained, regarding his testimony about the
19 under underlying facts.

20 For example, Mr. Bratic was saying
21 things like they put all their money into
22 completing this integration in 2006, and I
23 think -- I don't think it's appropriate for them
24 to have that testimony as a whole. Mr. Wagner

1 did not do that. So I think there's an
2 imbalance there.

3 I think if there is some more
4 specific portion, we obviously don't know what
5 they're looking at, but if it's, for example, we
6 wants to hear about what Mr. Bratic did to
7 verify the Duff & Phelps number and what Wagner
8 did to criticize that -- if it's something
9 narrower, maybe we could consider it further.
10 But I think our position is that they should not
11 get the testimony.

12 THE COURT: All right. Well, let
13 me tell you what I think, which is the Third
14 Circuit case law says there are two things that
15 I'm supposed to take into account in exercising
16 my discretion, and one is whether, which does
17 not apply so much for the transcript, whether
18 the request may slow the trial when the
19 requested testimony is lengthy, so that's more
20 applicable perhaps with reading it back. And
21 the other is, when read, only a portion of the
22 testimony, the jury may give undue weight to
23 that portion.

24 You know, here, they have asked

1 for both damages experts, and so presumably what
2 they've asked for is complete testimony of each
3 of them.

4 And so the case law further says
5 that there's probably a cautionary instruction
6 that ought to be given the jury if you are
7 giving it back because, as you sort of point
8 out, even if you say there's a one-to-one
9 relationship between Bratic and Wagner, because
10 they're both damages experts, in fact, their
11 testimony does not necessarily correspond one to
12 one, and to the extent that both of them are
13 doing things that -- you know, there is some not
14 necessarily a hundred-percent evenness of their
15 testimony.

16 And so -- but it seems as though
17 the Third Circuit's preference is that that be
18 dealt with an instruction.

19 So what I'm inclined to do is to
20 bring the jury in, tell them we're going to
21 prepare the transcripts of the two damages --
22 Mr. Wagner and Mr. Bratic.

23 This is going to take a little bit
24 of time because we have to -- because even

1 though the transcript is in existence, it's not
2 proper that they get the whole thing. But then
3 what I'm going to ask the two sides to do is to
4 remove the sidebars and remove the struck
5 testimony, that probably doesn't apply too much
6 to Mr. Wagner, but to remove it, black it out,
7 whatever you need to do, so that they get the
8 actual Bratic testimony and the actual Wagner
9 testimony.

10 And I will give them the
11 cautionary instruction now, and I don't know
12 exactly how long this will take you all to do,
13 but I figured it would probably take than hour.
14 I will tell them we'll give them testimony in
15 due course.

16 MR. SCHUMAN: By cautionary
17 instruction, your Honor, are you referring to
18 the cautionary instruction every time the number
19 came up?

20 THE COURT: No, no, no, not that
21 one. Just that when they get a portion of the
22 evidence in the case, that they should not --
23 they should focus on the entire testimony in
24 evidence, and just because they're getting some

1 portion in writing, not to focus on that,
2 something along those lines.

3 MR. SCHUMAN: Well, I think
4 getting them the testimony -- the Court dealt
5 with this with a procedure where Mr. Bratic was
6 entitled to say the number once, and then you
7 gave the cautionary instruction, I think he
8 actually said it twice, and you gave the
9 cautionary instruction both types.

10 If the jury is going to have the
11 testimony back there with the number, they are
12 going to get to see it and hear it as many times
13 as they want. So I think the cautionary
14 instruction would apply as well.

15 THE COURT: Oh, that cautionary
16 instruction, yes, that should be left in.

17 MR. SCHUMAN: And I would --

18 THE COURT: But the parts where
19 there were, you know, I remember there were some
20 sidebars. Whatever was said there, that should
21 be out.

22 MR. SCHUMAN: Oh, I would agree.

23 And then we would request, I think
24 your Honor would recall when Mr. Bratic got done

1 with his testimony, we made a request for a
2 curative instruction regarding all of the
3 underlying factual testimony he was giving,
4 and --

5 THE COURT: I'm not going to give
6 a curative instruction now that I wouldn't give
7 before.

8 MR. SCHUMAN: Okay. So the
9 curative instruction -- can we get a cite for
10 the Third Circuit case and we can take a look at
11 it?

12 THE COURT: Yes. United States
13 versus Bertoli, 40 F.3d, 1384. The relevant
14 pages are 1400 to 1401.

15 MR. SCHUMAN: Thank you.

16 THE COURT: Mr. Cantine, I think
17 Mr. Rovner ably represented your interests.

18 MR. CANTINE: I missed the
19 beginning and I apologize.

20 THE COURT: All right. You know,
21 I had thought -- my fault. I thought you were
22 closer by, as Mr. Rovner said he was close
23 by.

24 So you can go back to Mr. Rovner's

1 office when we're done or stay in the courthouse
2 or do something, but 20 minutes is too long,
3 really.

4 MR. CANTINE: I'm sorry. We were
5 actually getting the transcripts and stuff that
6 we thought --

7 THE COURT: Okay.

8 MR. CANTINE: We'll be more
9 prompt.

10 THE COURT: Yes, yes. I mean, you
11 know, I was trying to give you a -- both sides a
12 heads-up on the question so you could be
13 thinking about it.

14 MR. CANTINE: Right.

15 THE COURT: But I wasn't
16 necessarily planning that you, that you sit
17 there and do some quick research or whatever. I
18 wanted you to be thinking as you were coming
19 here.

20 MR. CANTINE: Understood.

21 THE COURT: Okay.

22 MR. CANTINE: So is the plan -- I
23 missed it. We're going to give them the actual
24 transcript or are we going to read it back?

1 THE COURT: My inclination is,
2 since they've asked for the transcript and we
3 have the transcripts, to give them the
4 transcripts.

5 MR. CANTINE: Okay. You just want
6 us to redact that stuff, the sidebars and that
7 kind of stuff?

8 THE COURT: Yes.

9 MR. CANTINE: Okay. I guess the
10 only question would be, you know, some of the
11 information was on the demonstratives.

12 THE COURT: Well, they are not
13 going to get the demonstratives.

14 MR. CANTINE: All right.

15 THE COURT: They are going to get
16 the testimony. That's what they asked for. To
17 the extent the people didn't say it, they didn't
18 say it.

19 MR. CANTINE: I assume we're not
20 giving them the expert reports.

21 THE COURT: We're not giving them
22 the experts reports. As I said, Mr. Rovner
23 handled it very ably.

24 MR. CANTINE: All right.

1 THE COURT: So I guess the only
2 question is, should we bring the jury in now and
3 just tell them that we will be -- you know, my
4 inclination is to just bring them in now and say
5 that it will take a bit of time to fully
6 respond, but there will be --

7 MR. CANTINE: That's fine with us.
8 I don't think it's going to take more than
9 half-an-hour or so to redact the stuff, so if
10 you want to give them a heads-up of how long
11 it's going to be.

12 THE COURT: All right. Well, in
13 any event, so why don't we just get the jury.

14 MR. ROVNER: You're optimistic.

15 THE COURT: I'm also going to tell
16 them right now, they are not going to get the
17 report.

18 MR. CANTINE: Okay.

19 (The jury entered the courtroom
20 and took their seats in the box.)

21 THE COURT: Please be seated.

22 Welcome, Members of the Jury. I
23 do have your note, which is basically two
24 questions, and the first one is, can we see the

1 testimony of both damage experts, Mr. Bratic and
2 Mr. Wagner?

3 The second question is, can we see
4 the expert reports about the damages?

5 In terms of the second question,
6 the answer is going to be no, because they
7 weren't admitted into evidence.

8 In terms of the first question, I
9 am going to arrange for transcripts of the
10 testimony to be presented to you. When we
11 present it to you, I'm going to have you come
12 back in, because there are some instructions I
13 want to give with it, and it's going to take a
14 little while because the Court Reporter writes
15 down everything that happens, even the stuff
16 that you didn't hear, so we're going to need to
17 work on the transcripts to make sure you are
18 getting what you are supposed to get.

19 So I just wanted to let you know
20 that we do have the question and that we will be
21 working on it and it will take some time and
22 that we'll call you back in when we're ready to
23 give it to you. All right? All right.

24 Can we take the jury back out?

1 (The jury was excused to the jury
2 room.)

3 THE COURT: While you're going
4 over the two transcripts, at Page 1401 of the
5 Bertoli opinion, there are at least two passages
6 that are germane as to what kind of instruction
7 I should give them when giving them the
8 transcripts, so you might want to see if you
9 can't, while you're working on the transcripts,
10 work on the instruction that I'm going to give
11 them.

12 MR. CANTINE: That was on 1400,
13 you said, your Honor?

14 THE COURT: 1401.

15 MR. CANTINE: 1401? Great.

16 THE COURT: All right. So we'll
17 stand in recess. Let me all know when you have
18 reached agreement or can't reach agreement.
19 Okay?

20 MR. SCHUMAN: Thank you, your
21 Honor.

22 MR. CANTINE: Thank you.

23 (Recess taken.)

24 - - -

1 (Proceedings resumed in the
2 courtroom, beginning at 2:17 p.m.)
3

4 THE COURT: Good afternoon. Be
5 seated.

6 Mr. Schuman?

7 MR. SCHUMAN: Your Honor, if I
8 might be heard briefly on the Bertoli case.

9 THE COURT: Yes.

10 MR. SCHUMAN: So, your Honor,
11 during the break I read the case, we read the
12 case, and I think it's distinguishable in at
13 least two very fundamental ways.

14 First, the Court held there, we
15 further hold that in this case, the trial court
16 did not abuse its discretion by providing the
17 jury with the written transcripts.

18 The jury requested the transcripts
19 of 12 witnesses, so the danger of giving undue
20 weight to particular testimony was minimized.

21 The opinion does not say how many total
22 witnesses there were, so it's not clear whether
23 there were 12 witnesses and the jury asked for
24 the testimony of all the witnesses, but the

1 Court was making the point that the danger of
2 the jury giving undue weight was minimized. And
3 here, of course, we're only giving the jury two
4 transcripts.

5 Secondly, the Court -- the case
6 did not deal with the testimony of experts. It
7 dealt with precipient witnesses. And here, of
8 course, we have a different situation. We have
9 two experts. And one of those experts, at
10 least, Mr. Bratic, did extensively go through
11 precipient witness e-mails and purported to
12 testify about them and give his interpretation
13 of them as an expert.

14 So one of the grounds for refusing
15 to provide the testimony to the jury, as stated
16 in the Bertoli case, is that reading only a
17 portion might cause the jury to give that
18 portion undue emphasis. And I think what they
19 are talking about there is not a portion of a
20 particular witness' testimony, but, rather, a
21 portion of the testimony in the case.

22 And in Bertoli they said the
23 defendant there failed to specify a single
24 example in the procedure the Court followed that

1 presented a particular danger of prejudice, and
2 while we've been working diligently, and I don't
3 mean to be exclusive, there are some very clear
4 examples here of the point I'm making and the
5 danger of prejudice in giving this testimony to
6 the jury.

7 One example is on page 1261. This
8 is when Mr. Bratic was asked about the
9 December 17th, 2005, e-mail from Mr. Hernandez.
10 The Court may recall, this is the internal Cisco
11 e-mail where Mr. Hernandez was reporting to
12 others that he had had this conversation with
13 Ms. Eiss and that he told them we wanted to move
14 on a SolutionsPlus arrangement.

15 In his testimony, Mr. Bratic was
16 asked, "how did it help you in forming your
17 opinion?

18 "Answer: Well, this is Mr.
19 Hernandez reporting it. He talked to
20 XpertUniverse and he told them Cisco wants to
21 move forward with the SolutionsPlus program, if
22 XpertUniverse would agree to remove Genesys and
23 work with Cisco exclusively."

24 Ms. Eiss and Mr. Hernandez both

1 testified live regarding that conversation, and
2 neither of them said what Mr. Bratic interprets
3 the e-mail to be saying.

4 This is a very clear example of
5 the prejudice of allowing Mr. Bratic's testimony
6 to go back there without also providing the
7 testimony of all these other witnesses, and I
8 would certainly suggest that the solution here
9 is not to provide them with the testimony of
10 every witness.

11 There are other examples of
12 Mr. Bratic doing the same thing. He goes on
13 here to talk about his interpretation of Ken
14 Jordan's e-mail, where Mr. Jordan is asking a
15 question regarding Cisco's long-term plans in
16 the Knowledge Worker Space.

17 And we had Mr. Jordan's deposition
18 testimony up on the screen, where he provides
19 testimony about that exact e-mail, and he says,
20 I was asking a question. This is me not knowing
21 what the long-term plan is. I may have been out
22 of my place in asking the question, but, of
23 course, Mr. Bratic puts his own spin on that.
24 And he gives testimony that the jury might

1 unduly credit over the testimony that was on the
2 video screen of Mr. Jordan.

3 In addition, your Honor, another
4 concrete example of the prejudice of providing
5 them with this testimony, if you go to page 1319
6 of Mr. Bratic's testimony, starting at the
7 bottom of that page, there's some black-out, and
8 it goes on to 1320.

9 The Court may recall what
10 Mr. Bratic was doing here is he was asked on
11 page 1319 about these projections for Remote
12 Expert, \$1.6 billion through 2014.

13 And what he says here on 1319,
14 and I'm just going to read from the middle of
15 the page -- the question actually starts on
16 1318.

17 He says, "What we've seen is
18 projections where they're projecting outwards of
19 1.6 billion in sales for Remote Expert only for
20 the financial services market. So the royalties
21 will only, if those sales occur, they will only
22 increase significantly over time.

23 "Question: And if you apply that
24 five percent royalty to that \$1.6 billion

1 projection, what would you come to?

2 "You end up with \$80 million.

3 "Question: The numbers aren't
4 that far off, are they?

5 "No."

6 And then when the questions
7 continued down that path, the Court sustained
8 Mr. Damsgaard's objection. This is improper.
9 It was improper. It's not in his expert report,
10 and obviously the Court found other
11 improprieties with what he was actually
12 testifying to.

13 So the jury may not remember that
14 \$80 million number, but certainly if the jury
15 gets this transcript, they're going to be seeing
16 another number that should not have been
17 testified to. It was improper and the Court, of
18 course, appreciated that, and when Mr. Damsgaard
19 objected, struck it.

20 Another concrete example is that
21 in the -- he also provides a lot of testimony,
22 your Honor, and I appreciate that experts are
23 allowed to rely on hearsay, but, you know, and
24 he does this throughout.

1 But at page 1263 is an example of
2 Mr. Bratic substantively testifying that
3 XpertUniverse in 2006 was marching along,
4 spending their time and resources on completing
5 this integration project, which is the single
6 biggest thing going on at XpertUniverse in 2006.

7 I appreciate that Mr. Bratic may
8 be allowed to say those things when he's on the
9 stand based on his interviews with, you know,
10 people at XpertUniverse or whatever. But, of
11 course, the subject of whether XpertUniverse
12 completed this integration project was a hotly
13 disputed issue at trial, where a number of
14 witnesses, live witnesses, were asked about it,
15 testified about it, were cross-examined about
16 it. Obviously, I made the point in my closing
17 argument, there are no documents about it.

18 If the jury just gets Mr. Bratic's
19 testimony, even if they also get Mr. Wagner's
20 testimony, without the benefit of all of the
21 other testimony on the subject of whether this
22 integration project was completed, there is a
23 very real risk of prejudice that they may
24 believe Mr. Bratic knows something about

1 whether this integration project was actually
2 completed.

3 Those are some of the examples,
4 your Honor. I believe the Bertoli case talks
5 about specific examples of prejudice, and those
6 are three. I would submit that that is a
7 non-exhaustive list.

8 Mr. Bratic testifies about a
9 number of the internal Cisco e-mails throughout
10 his deposition and provides his spin on them,
11 wearing his expert hat. And I would submit that
12 the Bertoli case does not authorize this
13 procedure.

14 Lastly, your Honor, if the Court
15 is willing to go down this path, we did confer
16 with XpertUniverse regarding an appropriate
17 cautionary instruction. This is obviously not
18 to waive my position that this -- that the jury
19 should not get these transcripts at all. But we
20 have an agreement on most of the instruction.
21 XpertUniverse has a problem with the last
22 sentence, and --

23 THE COURT: Let me see what you've
24 got.

1 MR. SCHUMAN: Sure (handing
2 document to the Court).

3 (Pause.)

4 THE COURT: All right. Well, I
5 would not be inclined to give the last sentence.

6 MR. SCHUMAN: Your Honor, on page
7 1400 crossing over to 1401 of the Bertoli case,
8 it says, for instance, in their review of the
9 transcript, jurors may seize upon an answer
10 without focusing on limitations or
11 qualifications developed during
12 cross-examination.

13 THE COURT: Well, that's the
14 reason for having the general kind of
15 instruction that we have in the middle of a
16 page, to consider all the evidence and not to
17 give more weight to this evidence than any other
18 evidence.

19 I could give an instruction that
20 said something like, when looking at the
21 transcripts, consider the transcripts as a
22 whole, or something like that, which is kind of
23 consistent with the jury instruction anyway
24 about considering the evidence as a whole.

1 But, in other words, there are two
2 things going on here. One is giving the
3 transcripts outside weight compared to the oral
4 testimony that is floating around in the back of
5 their mind, which is what you address up front.
6 And then there's also giving the sort of
7 internally testimony as a whole, concerning the
8 whole of the testimony.

9 And so the -- so I'm not opposed
10 to saying something that indicates that they
11 ought to consider the whole of the testimony of
12 these -- of these two transcripts, though I
13 don't think the way that you have proposed it
14 is -- actually, it's growing on me. But I don't
15 think it's really --

16 MR. SCHUMAN: Still growing on
17 you?

18 THE COURT: Well, not that much.

19 MR. SCHUMAN: I just want to make
20 clear, your Honor, that, you know, our position
21 and our objection would be to providing these
22 transcripts at all, and that without waiving
23 that right, we have --

24 THE COURT: I don't think you are

1 waiving any rights.

2 MR. SCHUMAN: Okay.

3 THE COURT: And I think the record
4 will be pretty clear on that. But let me just
5 think about this for a second.

6 (Pause.)

7 THE COURT: All right. Mr.
8 Cantine, what do you have to say?

9 MR. SCHUMAN: Just so the record
10 is clear, your Honor, the Ken Jordan example I
11 was referring to is on the bottom of 1261, 19,
12 over onto the top of 1262, line 13.

13 THE COURT: Right. I think it
14 immediately follows the other thing that you
15 cited?

16 MR. SCHUMAN: Yes. Basically
17 immediately followed it.

18 THE COURT: All right.

19 MR. SCHUMAN: Thank you, your
20 Honor.

21 THE COURT: Thank you.

22 Mr. Cantine?

23 MR. CANTINE: Thank you, your
24 Honor.

1 I think the Bertoli case is clear,
2 you have discretion. The jury asked for it, the
3 transcripts. I think we can give them the
4 transcripts. They've been properly redacted.
5 They are getting the entire scope of what they
6 wanted, not just our side, but their side as
7 well.

8 In terms of complaining about
9 Mr. Bratic's testimony, they had the opportunity
10 to object at that time. They had the
11 opportunity to cross-examine him at that time.
12 They had the opportunity to put their own expert
13 on and say why those e-mails don't say what they
14 say, whatever they wanted to do.

15 The other point, this \$80 million
16 number, it's in Mr. Bratic's report. I would be
17 happy to show it to you. So it was not outside
18 his report, as was just suggested.

19 THE COURT: Well, in any event,
20 it's kind of late for that objection.

21 MR. CANTINE: Exactly. So, you
22 know, I think our position is, your Honor,
23 Bertoli gives you the discretion to give the
24 transcripts. We think the transcripts should go

1 in. And we've taken the time. It's now three
2 hours later. We've got the redacted versions
3 ready to go to the jury.

4 THE COURT: All right. And in
5 terms of the cautionary instruction, I do think
6 I should say something besides we're not giving
7 the written word undue weight relevant to the
8 oral word. But aside from that, which you both
9 agreed on, I do think that I -- even though the
10 best I could come up with was further, when
11 considering the transcripts, you should consider
12 the testimony as a whole.

13 MR. CANTINE: That's fine, your
14 Honor. I think that's consistent with what
15 Bertoli said.

16 THE COURT: All right. Mr.
17 Schuman?

18 MR. SCHUMAN: Subject to our
19 reservation of rights, I think the language that
20 the Court has come up with is fine.

21 THE COURT: All right. All right.
22 Well, I think that in terms of what has been
23 said about Bertoli, you know, Mr. Schuman has
24 laid out that he's talking about precipient

1 witnesses and they're talking about expert
2 witnesses here. But I think we're also talking
3 about expert witnesses for both sides. And so I
4 would think that would cause me to alter the
5 balance, which, you know, it seems to me that
6 what Bertoli says is that if the Court
7 doesn't -- essentially, which is, if the Court
8 can, without unduly prejudicing a party or
9 risking the introduction of some other kind of
10 error, that it seems to be the preference to
11 provide what the jury asks for.

12 And I guess the other thing was,
13 Mr. Schuman said was, Bertoli involved 12
14 witnesses, that one couldn't really tell how
15 much -- what was the total they were. Here,
16 you've got two witnesses, and you know,
17 including depositions and live witnesses. The
18 other side, maybe a range of eight to ten
19 witnesses, probably no more.

20 But it seems that what the jury
21 wanted specifically involved, so to speak, the
22 head-to-head clash of the two damages experts.
23 So while I, you know, while I do not -- I don't
24 want to minimize what Mr. Schuman has mentioned

1 because, for one reason or another, I do think
2 Mr. Wagner got in a lot more argument than
3 Mr. Bratic did about things that are marginally
4 related to this expertise, I'm taking that into
5 account, that I don't think -- I think that if I
6 give the instruction, and perhaps even that I
7 will -- that with the proper instruction, I
8 think the jury will do its job without being
9 unduly influenced by things that Mr. Bratic said
10 that do not really particularly apply to his
11 expertise.

12 Hold on, Mr. Schuman.

13 MR. SCHUMAN: Yes, your Honor.

14 (Pause.)

15 THE COURT: All right. Yes, Mr.

16 Schuman?

17 MR. SCHUMAN: Just having the
18 benefit of the reading the Bertoli case since we
19 started, and appreciating we don't know what the
20 jury is really asking for, you know, one
21 suggestion -- the Court made the comment about
22 what the head-to-head is on the experts. I
23 mean, there is a portion of Mr. Bratic's
24 testimony that is fairly -- you know, we've all

1 just read the transcripts here over the last
2 couple of hours, as Mr. Cantine said. There's a
3 portion of Mr. Bratic's testimony that is
4 focused on, for better, for worse, the Duff &
5 Phelps report and the examination and
6 cross-examination of him on that. And, of
7 course, Mr. Wagner has a corresponding
8 head-to-head portion of his testimony.

9 Likewise, there's a fairly confined portion of
10 Mr. Bratic's testimony that deals with his
11 reasonability royalty calculation and how he got
12 there and the Georgia-Pacific factors, and, of
13 course, there's a head-to-head portion of
14 Mr. Wagner's testimony.

15 And so, again, if the Court is
16 going to submit the transcripts, which I
17 understand that's what the Court is prepared to
18 do, I would request that we put it, narrow it
19 down to the head-to-head between the experts on
20 the actual damages issues that these two
21 witnesses were retained to testify about, the
22 two damage theories on the two claims.

23 MR. CANTINE: I don't think that's
24 necessary, your Honor. Trying to parse that and

1 thread that needle with an instruction is going
2 to be next to impossible, I think.

3 THE COURT: Well, I mean, there
4 is -- I do think, Mr. Cantine, that you're
5 essentially right, that if we started trying to
6 do that, there's not enough time left in today
7 to even get it done.

8 MR. CANTINE: Exactly.

9 THE COURT: Now, that doesn't mean
10 that if it were required and it was clear that
11 that is what the jury was asking for, then that
12 would be maybe one thing, but I do -- you know,
13 it's never a good idea to try to guess what the
14 jury is thinking, and, in fact, when there's a
15 request, you never know whether it's one juror
16 who wants it or all eight of them.

17 So there are a lot of unknowns
18 here. But it is a logical request that was
19 made, to have both sides' expert testimony on
20 damages. And so I'm going to go ahead and give
21 them the transcripts. And I just want to think
22 one more minute about this instruction.

23 (Pause.)

24 THE COURT: All right. So I was

1 thinking of amending the instructions a little
2 bit. I don't know who actually has a copy of
3 this.

4 But the sentence that was
5 submitted that both parties agreed on was, in
6 the second sentence, in considering these
7 transcripts, I would caution you to consider all
8 the evidence in addition to these transcripts
9 and not to give more weight to this evidence
10 than to any other evidence.

11 I was thinking of modifying that
12 to say, in considering these transcripts, I
13 would caution you to consider all the evidence
14 in addition to these transcripts and not to give
15 more weight to the evidence -- to this evidence,
16 sorry, to this evidence simply because it is in
17 writing than to any other evidence and, in
18 particular, to other evidence than you heard,
19 but do not have in writing.

20 MR. CANTINE: That's fine with us,
21 your Honor. I think that's appropriate.

22 THE COURT: All right. And then I
23 would also then, further, when considering the
24 transcripts, you should consider the testimony

1 in the transcripts as a whole.

2 All right?

3 MR. CANTINE: I have them here, if
4 you want them.

5 THE COURT: All right.

6 MR. CANTINE: Just one copy.

7 THE COURT: I'm counting on the
8 fact that you all have determined that even if
9 you hold it up to the light, you can't read what
10 has been blacked out.

11 MR. CANTINE: Yes. We've had it
12 photocopied and that's my understanding.

13 THE COURT: Okay. Well, why don't
14 you give that to my deputy clerk.

15 (Mr. Cantine handed transcripts to
16 the clerk.)

17 THE COURT: And I guess we should
18 go get the jury. Usually about this time is
19 when they announce they have a verdict.

20 (The jury entered the courtroom
21 and took their seats in the box.)

22 THE COURT: Please be seated.

23 Good afternoon, Members of the Jury.

24 You had earlier sent a question,

1 can we see the testimony of both damage experts,
2 Mr. Bratic and Mr. Wagner. The parties have
3 taken the transcripts, which are in excess of
4 200 pages for these two witnesses, and have
5 blacked out portions that you either didn't hear
6 or you shouldn't have heard, and so we're
7 prepared to give them to you.

8 So I'm providing them to you, the
9 two transcripts of the damages experts because
10 you've requested them.

11 In considering these transcripts,
12 I would caution you to consider all the evidence
13 in addition to the transcripts and not to give
14 more weight to this evidence simply because it
15 is in writing than to any other evidence, and,
16 in particular, to other evidence that you heard,
17 but that you do not have in writing.

18 Now, further, when considering the
19 transcripts, you should consider the testimony
20 in the transcripts as a whole.

21 So with that, I will send you back
22 for further deliberations and we will have the
23 transcripts sent back to the bailiff, who will
24 give them to you. All right? Thank you.

1 (The jury was excused to the jury
2 room.)

3 THE COURT: All right. Thank you.

4 MR. CANTINE: Thank you, your
5 Honor.

6 THE COURT: Mr. Cantine, if you go
7 away, don't go too far. Okay?

8 MR. CANTINE: I won't go far.

9 THE COURT: All right. Thank you.

10 (Court recessed at 2:47 p.m.)

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